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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MOISES ALBENO MULATILLO,

Defendant and Appellant.

B213758

(Los Angeles County
Super. Ct. No. PA019347)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ronald S. Coen, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C.
Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant Moises Albeno Mulatillo absconded from probation after pleading no contest in 1995 to inflicting corporal injury to a spouse. He was found in violation of probation and sentenced to three years in state prison. On appeal defendant contends the trial court did not exercise informed discretion in refusing to reinstate him on probation with modified conditions. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After defendant Moises Albeno Mulatillo punched his wife in the face, he was charged by felony complaint on January 17, 1995, with one count of inflicting corporal injury to a spouse (Pen. Code, § 273.5). Pursuant to a negotiated agreement, defendant waived his constitutional rights and entered a plea of no contest to the offense on January 27, 1995. In accordance with the plea agreement, on February 10, 1995, imposition of sentence was suspended, and defendant was placed on three years probation subject to various conditions, among them that he serve 365 days in county jail and report to the probation department within 24 hours of his release from custody.

On July 19, 1995, defendant's probation was summarily revoked and a bench warrant was issued for his arrest after he absconded from probation. On November 20, 2008, defendant appeared in court for a probation violation hearing after being arrested on the outstanding warrant. The trial court continued the proceedings and ordered a supplemental probation report.

The supplemental probation report recommended that defendant be found in violation of probation and be committed to state prison, rather than reinstated on probation. According to the report, defendant had failed to comply with several conditions of probation in this case, including having to report to the probation department within 24 hours of being released from custody. The report also indicated defendant was convicted in 1997 of felony possession of a controlled substance in Texas.

At the contested revocation hearing on January 23, 2009, probation officer Horacio Ramirez testified defendant's probation file failed to show defendant's compliance with the condition he report to the probation department within 24 hours of

his release from custody. Defendant neither testified nor presented other evidence in his defense at the revocation hearing.

After brief argument by defense counsel, the trial court found defendant had violated probation by failing to report to the probation department. At the sentencing hearing, which immediately followed, defendant had two witnesses testify in mitigation. Rosario Chavez testified to having known defendant for at least four years. She considered him to be a good, hard working and honest person. Oscar Antonio Zepeda testified to having known defendant for seven years, and found him to be a good and generous person, who was active in his church. The defense submitted photographs depicting defendant's missionary work for his church.

Defense counsel maintained that since his 1997 conviction in Texas, defendant had turned his life around and had become extensively involved in his church. Counsel urged the trial court to reinstate the previous order of probation on condition that defendant serve a sentence in county jail, at the conclusion of which probation would be terminated.

In refusing to reinstate probation, the trial court stated that defense counsel's proposed disposition in effect rewarded defendant for having absconded from probation. Having read and considered the original and supplemental probation reports, the court remarked that in 1995, defendant had a lengthy criminal record and was on probation in three different cases at the time, including a 1994 conviction for inflicting corporal injury to a spouse.¹ The court expressed surprised defendant was originally granted probation,

¹ The probation officer's reports showed defendant, 54 years old in 2009, had eight prior California convictions, as well as his Texas conviction: a 1988 conviction for battery on transportation personnel for which he was granted probation; a 1990 conviction for driving under the influence for which he was granted probation; a 1992 conviction for driving without a valid license for which he was granted probation, a 1992 conviction for soliciting sales of narcotics and driving with a suspended license for which he was granted probation, a 1994 conviction for inflicting corporal injury to a spouse for which he was granted probation, a 1994 conviction for battery for which he was sentenced to 30 days in county jail and was granted probation, a 1994 conviction for carrying a concealed weapon in a vehicle for which he was sentenced to 30 days in

given his criminal history, and noted defendant had two more contacts with law enforcement after absconding from probation: in 1997 defendant was convicted of a felony drug offense in Dallas, Texas; and in 2000 he was arrested in Paris, Texas.² The court reiterated, “[T]he fact that [defendant] has remained arrest free is something I just can’t reward [him] for. [¶] Defendant is not suitable for the reinstitution of probation. Probation will not be reinstituted.”

DISCUSSION

Defendant contends the trial court did not exercise informed discretion in deciding the outcome of the probation revocation hearing, and the resulting state prison sentence thus violated his right to due process.³ It is true “[d]efendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citation.]” (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) A court cannot exercise such “informed discretion” where it is unaware of the scope of its discretionary powers (*ibid.*). However, nothing in the record suggests the trial court misunderstood or was unaware of its discretionary authority in this case.

When probation terms are violated, a trial court may exercise its discretion to reinstate probation with additional terms rather than imposing a prison sentence. (See, e.g., *People v. Hilger* (2005) 131 Cal.App.4th 1528, 1531-1532.) Because violations of probation are usually not rewarded, when a trial court does reinstate probation the terms are usually aggravated and not mitigated. (*Ibid.*) Furthermore, “[t]he sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120;

county jail and was granted probation, and the 1995 conviction for inflicting corporal injury to a spouse, for which he was sentenced to serve 365 days in county jail and granted probation.

² The probation report reflects the prosecution “rejected the charge without a pre-trial diversion.”

³ Defendant is not challenging the imposition of the middle term.

Cal. Rules of Court, rule 4.414.⁴) To establish an abuse of discretion, the defendant must show that, under all the circumstances, the denial of probation was arbitrary, capricious or exceeded the bounds of reason. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 834-835; see also *People v. Carmony* (2004) 33 Cal.4th 367, 377 [“[A] “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’”] [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it”].) “Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation.” (*Carbajal*, at p. 1120.) “[A] grant of probation is not a matter of right but an act of clemency.” (*People v. Covington* (2000) 82 Cal.App.4th 1263, 1267.)

The record establishes defendant was afforded due process at the probation revocation hearing; the trial court exercised informed discretion in imposing a state prison sentence rather than reinstating defendant on modified conditions of probation. Defendant asserts because the court reviewed his criminal record and then responded to his counsel’s argument in mitigation by stating, “And again, the fact that [defendant] has remained arrest free is something I just can’t reward,” the court either misunderstood or was unaware of its discretion to reinstate probation with modified conditions. On the contrary, considered in context, the statement reflects the court’s view that, notwithstanding defendant’s recent good works and apparent law-abiding behavior, he should not be allowed to profit from having absconded from probation and remained at large for 13 years. By using the words, “I can’t” the court was not saying it was legally prohibited from reinstating probation, but rather that it was unable to reasonably justify reinstating probation under the circumstances.

⁴ All rule references are to the California Rules of Court.

Additionally, the trial court's decision was not an abuse of discretion. Before ruling, the court properly considered defendant's background, witnesses' statements, and the arguments of counsel. The court gave a reasoned explanation for refusing to reinstate probation, resting its decision on defendant's prior record of criminal conduct (rule 4.414(b)(1)) and his prior poor performance on probation (rule 4.414(b)(2)). In sum, the trial court exercised informed discretion in electing not to reinstate defendant on probation, a decision that was neither arbitrary nor capricious under the circumstances of this case.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.